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Supreme Court of the United States

OCTOBER TERM, 1952

NO. 9

WILBUR C. KING, JERRY W. CARTER, and RICHARD A. MACK, as and constituting the FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION,

Appellants

vs.

THE UNITED STATES OF AMERICA,

Appellees

and

INTERSTATE COMMERCE COMMISSION,

Intervening Appellee

Appeal from the United States District Court for the Northern District of Florida

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PETITION FOR REHEARING OF OPINION AFFIRMING JUDGMENT OF DISTRICT COURT

LEWIS W. PETTEWAY,
Counsel for Appellants.

In the Supreme Court of the United States

OCTOBER TERM, 1952
NO. 9

WILBUR C. KING, JERRY W. CARTER, and RICHARD A. MACK, as and constituting the FLORIDA RAILROAD AND PUBLIC UTILITIES COMMISSION, *Appellants*	**Appeal from the United States District Court for the Northern District of Florida**
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THE UNITED STATES OF AMERICA, *Appellees*	
and	
INTERSTATE COMMERCE COMMISSION, *Intervening Appellee*	

PETITION FOR REHEARING OF OPINION AFFIRMING JUDGMENT OF DISTRICT COURT

Wilbur C. King, Jerry W. Carter, and Richard A. Mack, as and constituting the Florida Railroad and Public Utilities Commission, Appellants, by their undersigned attorney respectfully pray that this Court grant rehearing of its opinion of December 22, 1952, affirming the judgment of the Northern District Court of Florida, and that on rehearing said judgment be reversed.

The far-reaching implications of said opinion, its judicial enlargement of the Interstate Commerce Commission's jurisdiction over state-prescribed rates, and the

approval by this Court of the Commission's unwarranted invasion of state sovereignty have disturbed the state regulatory agencies to such an extent that the National Association of Railroad and Utility Commissioners has been directed to file with this Court a statement in support of this petition for rehearing and the following individual state regulatory agencies have requested these Appellants to join them in this petition:

California Public Utilities Commission
Arizona Corporation Commission, Phoenix
Public Utilities Commission, Denver, Colorado
Connecticut Public Utilities Commission, Hartford
Georgia Public Service Commission, Atlanta
Hawaii Public Utilities Commission, Honolulu
Idaho Public Utilities Commission, Boise
Louisiana Public Service Commission, Baton Rouge
Massachusetts Department of Public Utilities, Boston
Minnesota Railroad and Warehouse Commission, St. Paul
Montana Board of Railroad Commissioners, Helena
Public Service Commission of Nevada, Carson City
State Corporation Commission of New Mexico, Sante Fe
Public Utilities Commissioner of Oregon, Salem
Public Utility Administrator, Providence, Rhode Island
South Carolina Public Service Commission, Columbia
Railroad and Public Utilities Commission, Nashville, Tenn.
Washington Public Service Commission, Olympia
New Jersey Board of Public Utility Commissioners

With the Court's permission, Appellants desire to comply with the request of said state agencies and respectfully

pray that they be considered as parties to this petition for rehearing.

Reasons for Granting Rehearing

1. In the underlying rate proceedings (*Ex Parte 162 and 166*) when the Interstate Commerce Commission was considering the application of the nation's railroads for general increases in *interstate* rates, the Commission said that its estimate of increased revenues to be provided by interstate traffic was based "*upon the assumption that timely, similar adjustments will be made upon intrastate traffic.*" The Commission also said that as to rates of return on property values "*they presupposed that generally similar increases will be permitted by state authorities on intrastate traffic, or may become effective otherwise.*" The only meaning the quoted language can reasonably have is that in these general revenue proceedings to increase *interstate* rates the Commission *then and there pre-judged* any future 13th Section proceeding involving corresponding increases in *intrastate* rates. The Court's opinion herein of December 22, 1952, by recognizing and approving such action and practice by the Commission, effectively destroys the "full hearing" requirements of Section 13 (4) of the Interstate Commerce Act, renders said Section unconstitutional and void as violative of the due process clause of the Fifth Amendment of the Federal Constitution, and reduces the state regulatory agencies to mere "rubber stamps" contrary to the obvious intent and purposes of the Federal Congress as expressed in the National Transportation Policy and other pertinent provisions of the Interstate Commerce Act.

2. In said opinion the Court gave undue consideration and importance to the fact that a Committee of Cooperating

State Commissioners sat with the Commission, took part in its deliberations in the underlying interstate general revenue cases (*Ex Parte 162 and 166*), and concurred in the Commission's reports. Participation in these proceedings by a Committee of Cooperating State Commissioners is little more than a courtesy accorded the state agencies. The Cooperating State Commissioners have no vote in the proceedings and their participation in general revenue interstate rate cases as mere observers should not prejudice the rights of individual states in subsequent 13th Section proceedings involving intrastate rates.

3. The Court's opinion of December 22, 1952, in effect, considers the Interstate Commerce Commission's authority over intrastate rates to be the same as its authority over interstate rates in revenue cases; whereas, Section 13 (4) of the Interstate Commerce Act, from which the Commission derives its sole jurisdiction over intrastate rates, was primarily intended by Congress as a vehicle for removing discriminations against interstate commerce. Now, as broadened by the Court's opinion, said Section permits the private property of intrastate freight shippers, even in the absence of discrimination against interstate commerce, to be taken without due process of law and devoted to a public use; that is, the maintenance of a public transportation system for the postal service and the national defense whenever the continued operation of that transportation system is threatened by losses incurred in the rendition of transportation services in nowise related to the transportation of freight.

4. Congress has consistently protected and preserved the power and authority of the states to regulate intrastate commerce. This Court has said that *no Congressional*

legislation indicates any purpose to interfere with state-prescribed intrastate rates in the *absence of the prejudice or discrimination prohibited* by Section 13 of the Interstate Commerce Act. Heretofore, it has been universally understood by courts and commissions, alike, that the power of the Interstate Commerce Commission to alter intrastate rates comes into play only when those rates injuriously affect interstate transportation. That is the position this Court took in 1945 in the North Carolina case. There has been no intervening legislation by the Congress. The Commission's powers over intrastate rates have not been extended since that time by Congressional act. However, the Court's opinion of December 22, 1952 has now extended the power of the Commission far beyond the ability of Congress to legislate. *Constitutional limitations* upon the Congress would not permit specific legislation designed to destroy state regulation of intrastate rates. There can be no effective state regulation of intrastate rates so long as the Court's opinion of December 22, 1952 continues in force. The opinion should be reversed and state sovereignty in matters affecting intrastate rates should be permitted to continue in effect.

5. The Court's opinion apparently recognizes and does not reverse the Court's former opinion in the North Carolina case. The opinion here attempts to distinguish the findings in the North Carolina case and findings in the present case. In the North Carolina case the Commission found that the interstate fares were just and reasonable; that the intrastate fares were lower than the interstate fares and were not contributing their fair share to the revenues required to enable the railroads to render adequate and efficient transportation service; that conditions affecting interstate and intrastate travel were substantially

the same; that the maintenance of the lower intrastate fares caused unreasonable preference of intrastate commerce and unjust discrimination against interstate commerce; and that the findings were without prejudice to the right of the state to apply for modifications wherever justified. We hesitate to say that the Court overlooked the striking similarity between the findings in the two cases. Frankly, we can see no fundamental difference in the basic findings, and so we respectfully request the Court, if it does in fact adhere to its opinion in the North Carolina case, to carefully review the findings in the present case and the findings in that case. If the North Carolina opinion still stands, then we submit that the opinion in the present case should be reversed on rehearing because fundamentally the Commission's action in each case rests on a mere disparity in interstate and intrastate rates.

Conclusion

For the reasons set forth above, and in the briefs and pleadings herein, it is respectfully urged that rehearing be granted and that, upon such rehearing, the judgment of the lower Court be reversed.

Respectfully submitted,

LEWIS W. PETTEWAY,
Counsel for Appellants.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing petition upon all parties of record in this proceeding, by mailing a copy thereof properly addressed to each party as required by the Rules of Practice.

Dated at Tallahassee, Florida, this ..... day of January, 1953.

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Counsel for Appellants